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Tito Contractors, Inc. and International Union of Painters and Allied Trades, AFL-CIO District Council 51. Cases 05-CA-119008, 05-CA-119096, 05-CA-119414, 05-CA-123265, 05-CA-129503, 05-CA-131619, and 05-CA-134285

June 8, 2021

DECISION AND SUPPLEMENTAL ORDER

BY CHAIRMAN McFERRAN AND MEMBERS KAPLAN
AND RING

The General Counsel seeks partial summary judgment in this compliance proceeding on the basis that the Respondent's answers to certain allegations in the compliance specification are insufficient under the National Labor Relations Board's Rules and Regulations or attempt to relitigate matters that have been decided in the underlying unfair labor practice proceeding. The General Counsel also seeks summary judgment on those allegations in the compliance specification that the Respondent admits or declines to dispute. For the reasons set forth below, we grant the General Counsel's motion.

On March 29, 2018, the Board issued a Decision and Order,¹ finding, in pertinent part, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by (1) discharging, laying off, or otherwise discriminating against Maria Sanchez (M. Sanchez), Aracely Ramos Catalan, Reyna Sorto-Garcia, Yasmin Ramirez, Maria Chavez, Hernan Latapy, Jose Lopez-Bautista, and Nestor Sanchez (N. Sanchez);² (2) encouraging Maryland Environmental Services (hereinafter "MES") to request the removal of M. Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, and Chavez from a jobsite; and (3) disciplining and suspending Jose Amaya (Amaya). The Board further found that Respondent violated Section 8(a)(1) of the Act by disciplining employees pursuant to its discriminatory overtime policy, including ordering employee Noberto Araujo to return his company vehicle.

To remedy the 8(a)(3) violations, the Board ordered the Respondent to make whole M. Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, Chavez, Latapy, N. Sanchez, Lopez-Bautista, and Amaya for any loss of earnings and other benefits suffered as a result of the discrimination against them and fulfill certain other remedial obligations.

To remedy the 8(a)(1) violation, the Board similarly ordered, among other things, that the Respondent make employees whole for any loss of earnings or other benefits suffered as a result of the discrimination against them and restore Araujo the use of a company vehicle comparable to the vehicle he drove prior to April 2014. On May 24, 2019, the United States Court of Appeals for the District of Columbia Circuit issued its judgment enforcing the Board's Decision and Order.³

Because a controversy has arisen over the amount of backpay owed under the Board's Order, on August 3, 2020,⁴ the Regional Director for Region 5 issued a Compliance Specification and Notice of Hearing alleging the amounts owed. The compliance specification informed the Respondent of its duty to answer, indicating that under Section 102.56 of the Board's Rules and Regulations, "a general denial is not sufficient" for allegations regarding any matters within the Respondent's knowledge, and that its "answer must state the basis for any disagreement with any [such] allegations that are within the Respondent's knowledge and set forth in detail Respondent's position as to the applicable premises and furnish the appropriate supporting figures." The specification further warned that if the Respondent failed to do so, "the Board may find those allegations in the compliance specification are true and preclude Respondent from introducing any evidence controverting those allegations."

On August 13, the Respondent filed an answer to the compliance specification, and the General Counsel responded by email on August 26, informing the Respondent that its answer did not meet the requirements of Section 102.56(b) of the Board's Rules and Regulations. The Respondent filed an amended answer on September 1, admitting or declining to dispute certain paragraphs, generally denying others or disputing amounts owed, and asserting that: (a) the compliance specification's interim earnings and net backpay calculations are incorrect because they do not reflect seasonal labor fluctuations and because discriminatees failed to mitigate; and (b) it owes no backpay to employees who worked at MES, a state government contractor that has informed the Respondent that it would not permit their reinstatement.

On November 17, the General Counsel filed with the Board a Motion for Partial Summary Judgment with exhibits attached, arguing that the Respondent's answers either failed to meet the specificity requirements of the Board's Rules and Regulations or attempted to relitigate matters that had been decided in the underlying unfair

¹ 366 NLRB No. 47 (2018).

² We note that the Board's 2018 Order shortens the names of three discriminatees to Aracely Ramos, Reyna Sorto, and Mauricio Bautista.

We list them by their complete names consistent with the Compliance Specification and the Motion for Partial Summary Judgment.

³ *Tito Contractors, Inc. v. NLRB*, 774 Fed.Appx. 4 (D.C. Cir. 2019).

⁴ All subsequent dates refer to 2020 unless otherwise indicated.

labor practice proceeding. On November 24, the Respondent filed an opposition. On January 5, 2021, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why the motion should not be granted. On January 21, 2021, the Respondent filed its Response to the Board's Notice and Opposition to the General Counsel's Motion.

The Board has delegated its authority in this proceeding to a three-member panel.

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Sections 102.56(b) and (c) of the Board's Rules and Regulations provide as follows:

(b) *Form and contents of answer.* The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) *Failure to answer or to plead specifically and in detail to backpay allegations of specification.* . . . If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will

be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

We find merit in the General Counsel's contention that the Respondent's amended answer fails to meet these criteria with respect to various allegations in the compliance specification pertaining to the backpay period for employees working at the MES facility, the formulas for calculating gross backpay, the methods of calculating interim earnings and net backpay, mileage reimbursement, benefits, and adverse tax consequences. Rather, for these allegations, the amended answer simply amounts to a general denial.⁵

As the Board has recognized,

[i]t is well settled that a respondent's general denial of the backpay computations contained in a compliance specification will be deemed insufficient if the answer fails to specify the basis for the disagreement with the backpay computations contained in the specification, fails to offer any alternative formula for computing backpay, fails to furnish appropriate supporting figures for amounts owed, or fails adequately to explain any failure to do so.

Mining Specialists, Inc., 330 NLRB 99, 101 (1999) (citing *Best Roofing Co.*, 304 NLRB 727 (1991) and *Robincrest Landscaping & Construction*, 303 NLRB 377 (1991)); accord *Flaum Appetizing Corp.*, 357 NLRB 2006, 2007 (2011) ("A general denial is not sufficient to refute allegations pertaining to gross backpay calculations.") (citing *South Coast Refuse Corp.*, 337 NLRB 841 (2002); *U.S. Service Industries*, 325 NLRB 485, 486 (1998)).

The Respondent failed to adequately support its general denials listed in footnote 5 with specific alternative formulas, supporting figures, or calculations, all of which pertain to matters within the Respondent's knowledge. Nor has the Respondent adequately explained its failure to do so. Because the Respondent has failed to deny the allegations in the specific paragraphs of the compliance specification enumerated above as prescribed in Section 102.56(b) of the Board's Rules, and its failure to do so has

⁵ Specifically, the Respondent generally denies allegations contained in compliance specification pars. 1(a)–(c), 3(f) (yearly raises), 6, 9, 15 and 18.

Addressing par. 7, the Respondent generally denies that the discriminatees are entitled to be compensated for the adverse tax consequences of receiving make-whole relief in a lump sum when the backpay owed is for a period over a year in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). For the reasons discussed below in the decision, we reject the Respondent's general denial. In so doing, we note that, after the Board issued the decision in *Tortillas Don*

Chavas, it subsequently modified the Social Security Administration (SSA)–reporting remedy in both *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), and *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021). Under the Board's revised policy, (1) respondents are now required to provide backpay reports to the Region (rather than to the SSA) for transmission to the SSA, (2) the reports are required to allocate backpay to the appropriate calendar year (rather than to the appropriate calendar quarters), and (3) respondents must file with the Region copies of discriminatees' corresponding W-2 forms reflecting the backpay awards.

not been adequately explained, we deem those allegations to be admitted to be true under Section 102.56(c). Accordingly, we grant the Motion for Partial Summary Judgment as to the allegations in each such paragraph. See *Flaum Appetizing Corp.*, 357 NLRB at 2007; *Ybarra Construction Co.*, 347 NLRB 856, 857 (2006); *Paolicelli*, 335 NLRB 881, 883 (2001); see also *Baumgardner Co.*, 298 NLRB 26, 27 (1990) (finding partial summary judgment appropriate where respondent's answer to compliance specification failed to set forth an alternative number of applicable hours), enf. mem. 972 F.2d 1332 (3d Cir. 1992).

In its amended answers to paragraphs 1(d)(i)-(v), 9, 10 and 19, and as further detailed in its opposition, the Respondent argues that there is no backpay period owing to five discriminatees (M. Sanchez, Ramos Catalan, Sorto-Garcia, Ramirez, and Chavez), who were employed at an MES facility because MES refuses to rehire them. We reject this argument because it attempts to relitigate a matter already addressed in the Board's previous legal determinations. In the underlying decision, the Board found that the Respondent unlawfully encouraged MES to terminate those employees because of their union and other protected concerted activities. 366 NLRB No. 47, slip op. at 5. As such, MES' refusal to reinstate the five discriminatees does not toll the backpay period or relieve the Respondent from its obligation to provide a backpay remedy. See, e.g., *Jimmy Kilgore Trucking Co.*, 254 NLRB 935, 935 (1981) (requiring a respondent to make an employee whole when its actions caused his termination from a secondary employer).

Finally, in its amended answer to the compliance specification, the Respondent admits or declines to dispute

allegations contained in paragraphs 2, 3 (a)-(e), 4 and 5 (interim earnings and net backpay formulas),⁶ 8, 11, 12, 13, 14, 16 and 17. The General Counsel moves for summary judgment on these paragraphs based on the Respondent's failure to respond. We grant the General Counsel's motion as to each of these paragraphs.

ORDER

IT IS ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted except with regard to allegations concerning the discriminatees' interim earnings and expenses.⁷

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 5 for the purpose of arranging a hearing before an administrative law judge on the issues of interim earnings and expenses.

Dated, Washington, D.C. June 8, 2021

Lauren McFerran, Chairman

Marvin E. Kaplan, Member

John F. Ring, Member

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⁶ Addressing par. 4 of the compliance specification, the General Counsel concedes that the Respondent's general denial of interim earnings constitutes a sufficient response to the portion of par. 4 that is separate from the backpay formulas. We therefore deny summary judgment as to the second sentence of par. 4, listing discriminatees' interim earnings.

The General Counsel's Motion then addresses par. 5 of the compliance specification, noting that the Respondent's amended answer did not dispute the formula for computing calendar quarter net backpay but again

requesting summary judgment as to "paragraph 4's first sentence." We construe this inadvertent error as referencing par. 5's first sentence, which sets forth the formula for determining calendar quarter net backpay.

⁷ Because we deny summary judgment as to interim earnings, we also deny summary judgment as to pars. 5 (second sentence addressing net backpay due), 9, 10, 11, 12, 13, 14 and 19 solely to the extent that the calculations in those provisions rely on interim earnings or net backpay.